IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ANTHONY MARINELLO — PLAINTIFF

vs. — Civil Action No. 1:95cv167-D-D

PHILLIP BUSHBY, individually
and in his official capacity as Academic Program
Director of the College of Veterinary Medicine
at Mississippi State University, and
DWIGHT MERCER, individually
and in his official capacity as Dean of the
College of Veterinary Medicine at Mississippi
State University — DEFENDANTS

MEMORANDUM OPINION

Presently before the court is the motion of the defendants in this cause for the entry of summary judgment on their behalf with regard to the plaintiff's claims against them. Finding that the motion is only partially well taken, the undersigned shall grant it in part and deny it in part. This matter shall proceed to trial as set forth below.

I. Factual Background[1]

This matter arises out of the plaintiff's criticism and commentary concerning several of his professors during the process of the appeal of a grade received at the College of Veterinary Medicine ("CVM") at Mississippi State University. In light of the posture of this case, the court feels that a chronological description of the facts would be more efficient and more easily understood:

September 1991 — The plaintiff Anthony Marinello applies for admission to the CVM academic curriculum, seeking to obtain the degree of Doctor of Veterinary Medicine ("DVM"). In his signed application to the CVM, Mr. Marinello agreed to "maintain the highest degree of honesty, integrity, and professional standards while enrolled in the College of Veterinary Medicine and to conduct myself in a manner consistent with the code of Student Conduct of Mississippi State University and the adopted rules and regulations of the College of Veterinary Medicine." Defendants' Exhibit 1 to Motion Hearing of 6/6/95, Plaintiff's Application of Admission to the CVM. The existing Academic Performance Standards of the CVM note that a student's performance will be reviewed by the Academic Board of the CVM when that student fails to exhibit desirable

[1] In ruling on a motion for summary judgment, the court is not to make credibility determinations, weigh evidence, or draw from the facts legitimate inferences for the movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Rather, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255. The court's factual summary is so drafted.

professional behavior. Defendants' Exhibit 4A to Motion Hearing of 6/6/95, Academic Performance Standards of the CVM.

"The DVM curriculum is divided into four phases. Students are admitted to one phase at a time. The Phase 1 student who desires to continue in the DVM program must formally apply for admission to Phase 2. Likewise, the Phase 2 student must formally apply for admission to Phase 3 and the Phase 3 student must formally apply for admission to Phase 4." Defendants' Exhibit 4A to Motion Hearing of 6/6/95, Academic Performance Standards of the CVM, Unnumbered page 8.

March 1992 — The plaintiff is admitted as a student of the CVM as a member of the class of 1996. Mr. Marinello subsequently begins classes.

February 1994 — The CVM changes its four phase DVM curricula to a two phase one:

"The Academic Program, with the start of 1994, began a gradual change in the use of the expression 'Phase.' With the first two years of the curriculum being converted to problem-based learning and a faculty group studying the best structure and sequencing of the last two years, the Program is changing the Phase designations.

Phase 1: will consist of the first five semesters, all of the problem-based learning semesters; and will be divided into freshman and sophomore years.

Phase 2: will eventually consist of the last five semesters, comprising the clinical rotations and elective options in the curriculum, and will be divided into junior and senior years.

The intent of the change is to more logically group components of the curriculum. Like the implementation of the PBL, *this change in terminology is intended to follow the progression of the Class of 1997 through the curriculum."* Defendants' Exhibit 4A to Motion Hearing of 6/6/95, unnumbered page 9, Academic Program News, February 1994 (emphasis added). The student handbooks, however, are changed to reflect that the CVM uses a two-tier system and do not reflect this intent to implement such a gradual change.

May 1994 — Mr. Marinello is placed on academic probation at the CVM for receiving an "F" grade in the class of "Equine Health and Disease," taken the previous semester. The CVM denies him admission to Phase 3 of the curriculum pending the remedial action of retaking the failed class.

Summer 1994 — Mr. Marinello repeats the class "Equine Health and Disease," receiving a grade of "C."

August 1994 — The CVM admits the plaintiff to Phase 3 of the curriculum in light of Mr. Marinello's retaking of the failed class over the summer. The CVM does not, however, remove the plaintiff from Academic Probation.

"While on probation, a grade of 'D' this next semester would result in continuation of probationary status. A grade of 'D' in two or more courses or a GPA of less than 2.0 would result in denial of admission to the next Phase. Failure of one or more courses would result in dismissal from the program. Probationary status will be removed following a semester with no grades lower than a C." Defendants' Exhibit 7 to Motion Hearing held 6/6/95, Letter from defendant Bushby to plaintiff Marinello dated August 4, 1994.

Fall 1994 — Mr. Marinello receives a grade of "D" in the class entitled "Food Animal Practice."

October 21, 1994 — Mr. Marinello writes an appeal letter to the Academic Performance and Standards Committee. In the body of the letter, the plaintiff makes several critical references to professors at the CVM.

> "The following letter is an official appeal to my final evaluation regarding the Food Animal rotation. After receiving this evaluation, it has become quite clear to me that politics, cowardice, and corruptness have transcended the obligation of certain Food Animal faculty members to impartially educate those students involved in their rotation . . . "
>
> Plaintiff's Exhibit 2 to Motion Hearing held 6/6/95, Letter by Plaintiff dated 21, 1994. It is unclear to the court how many people received a copy of this letter from the plaintiff.

November 22, 1994 — Dr. J. Roger Easley, one of the plaintiff's professors referenced in Mr. Marinello's October 21 letter, writes to defendant Mercer and requests that Mercer "have Mr. Anthony Marinello evaluated by the Academic Performance and Standards Committee for violation of standards of reasonable professional behavior. Specifically, I am charging Mr. Marinello with false accusations, distortion of facts, and slanderous comments [in the October 21 letter] made against four faculty members, including myself." Plaintiff's Exhibit 4 to Motion Hearing held 6/6/95, Letter from Dr. Easley to defendant Mercer. The letter goes on to detail the particular reasons why Dr. Easley is requesting this action.

November 28, 1994 — Mr. Marinello receives a copy of Dr. Easley's letter during a meeting with defendant Mercer.

November 29, 1994 — Mr. Marinello writes to defendant Mercer concerning Dr. Easley's letter. Plaintiff's Exhibit 5 to Motion Hearing held 6/6/95, Letter from plaintiff to defendant Mercer.

November 30, 1994 — Defendant Mercer, after letter of recommendation from the Academic Performance and Standards Committee, declines to change the plaintiff's appealed "D" grade and so informs the plaintiff by letter. No mention of the plaintiff's criticism of his professors is mentioned in this correspondence.

> "As discussed with you on November 28, 1994, you have the option to appeal this grade to the next highest administrative level, that being the Provost and Vice President of Academic Affairs, Dr. Derek Hodgson." Defendants' Exhibit 1 to Motion Hearing held 6/6/95, Letter to plaintiff Marinello from defendant Mercer dated November 30, 1994.

December 19, 1994 — Dr. Vernon Langston informs the plaintiff by letter of a special committee formed by defendant Mercer:

> "Dean Mercer has convened a special committee to review the professional conduct relevant to your interaction with faculty during your food animal clinical rotation. More specifically, the committee is to examine evidence on both sides of the issue and advise him as to whether faculty harassment occurred, and whether there was a breach in professional conduct expected of students." Defendants' Exhibit 13 to Motion Hearing held 6/6/95,

Letter to plaintiff from Dr. Vernon C. Langston dated December 19, 1994.

The plaintiff's school handbook for that year contained the following provision:

> Academic Review:
> A student's performance will be reviewed by the Academic Board or the appropriate academic committee in the following circumstances:
> 1. Repeated absenteeism.
> 2. Failure to exhibit desirable professional behavior.
>
> Following academic review of a student's performance with the student, the Program has wide latitude but may include the following actions:
> 1. The student will be required to improve on class attendance and/or behavior.
> 2. The student will be placed on academic or *disciplinary* probation.
> 3. The student will be assigned appropriate remedial action.
> 4. The student will be required to repeat specific courses, activities or Phases.
> 5. The student will be dismissed from the program.
>
> Plaintiff's Exhibit 10 to Motion Hearing held 6/6/95, Policies and Procedures Handbook of the College of Veterinary Medicine, p.14 (emphasis original).

December-January 1995 — The Academic and Professional Standards Select Committee formed by defendant Mercer holds a hearing on the matter of allegations of unprofessional conduct by both the professors and Mr. Marinello.

"I . . . personally advised Mr. Marinello that the matter was to be heard by the Committee, that Mr. Marinello could identify any witnesses which he would like for the committee to interview, and that Mr. Marinello could make a personal presentation before the committee . . . . The Committee met, interviewed witnesses, including all of those requested by Mr. Marinello, reviewed documents, although none of those were presented by or received from Mr. Marinello during his oral presentation, and received Mr. Marinello's personal presentation." Defendants' Exhibit 12 to the Motion Hearing held 6/6/95, Affidavit of Dr. Vernon C. Langston.

Apparently, however, Mr. Marinello was not allowed further involvement in the hearing:

"Prior to being expelled from Mississippi State University, I was never told that there were witnesses against me and I was never told that I could cross-examine his witnesses." Affidavit of plaintiff attached to plaintiff's response to motion for summary judgment, p.2.

The plaintiff also claims ignorance of the charges against him at the hearing:

"I was never given any notice of any specific charges against me. I was never told, for example, that I was charged with making any specific false statements. Prior to being told that I would not be allowed into the fourth year of study, I was never told what statements I had made which were claimed to be false." Plaintiff's Affidavit, p.2.

January 19, 1995 — The Academic Performance and Standards Committee mails its report to

defendant Mercer and is of the opinion that the plaintiff violated the Principles of Ethics:

"On the remaining issues of conduct the committee was in agreement. More specifically, in his letter of October 21, 1994 Mr. Marinello attacked the competence of one faculty member and accused several food animal faculty members of being ethically and professionally corrupt. While Mr. Marinello spoke with the committee in some detail regarding this letter and in fact restated his assertion that the charges were correct, he never presented any evidence to substantiate his opinions. The committee was unanimous in its finding that there was no professional misconduct or collusion on the part of the remaining food animal faculty but rather that Mr. Marinello breached the conduct normally expected of a professional student. Specifically, accusations outlined in his letter of October 21, 1994 violate the AVMA Guidelines for Professional behavior which state that no one should 'belittle or injure the professional standing of another member of the profession or unnecessarily condemn the character of that person's professional acts in such a manner as to be false or misleading.'" Plaintiff's Exhibit 6 to Motion Hearing held 6/6/95, Letter from Select Committee to defendant Mercer.

January 25, 1995 Defendant Mercer writes to the plaintiff and informs him of Mercer's and the Committee's findings:

"The accusatory manner of your grade appeal and the unsubstantiated accusations against numerous faculty members causes me the greatest concern for your future success in this profession. As stated in the attached letter [report of the committee dated January 19, 1995] you have 'breached the conduct normally expected of a professional student.'" Plaintiff's Exhibit 6 to Motion Hearing held 6/6/95, Letter from defendant Mercer to plaintiff dated January 25, 1995.

Because of his and the committee's findings, Mercer placed Mr. Marinello on disciplinary probation, and restricted Mr. Marinello's admission to the final phase of the veterinary program at the CVM - Phase 4. Defendant Mercer stated that admission to Phase 4 would be contingent upon Mr. Marinello:

1) pursuing "counseling, privately or on campus, to address the appropriate and professional means of dealing with anger and conflict;" and

2) reading and reporting on the AVMA Principles of Veterinary Medical Ethics.

"I require that you provide me with a written synopsis clearly indicating your understanding of these principles and how they apply to your conduct during the grade appeal process. Furthermore, I require that you schedule an appointment to meet and discuss your paper with me. . . . In summary, the unsubstantiated accusations made in your grade appeal are considered unprofessional. This unprofessional behavior has resulted in your being placed on disciplinary probation and in the designation of the above mentioned corrective actions as prerequisite to admission to Phase 4 of the curriculum. Disciplinary probation will remain in effect throughout your academic tenure at the college and any further episodes of unprofessional behavior will result in dismissal from the curriculum." Plaintiff's Exhibit 6 to Motion Hearing held 6/6/95, Letter from defendant Mercer to plaintiff dated January 25, 1995.

March 6, 1995 The University Academic Review Board meets and hears Mr. Marinello's appeal of defendant Mercer's decision to uphold the "D" grade in the Food Animal class. Additionally, the Board reviews the disciplinary probation imposed by defendant Mercer via the January 25 letter.

"Mr. Marinello was notified of the times and dates that our committee would meet. He was present during the entire evidentiary stage of the hearing and made a personal presentation. He was allowed to have any witnesses he desired called before the committee and to submit any documents which he desired to submit to the committee for consideration.

Upon completion of the meetings, the Committee voted to uphold the 'D' grade received by Mr. Marinello and to uphold the probation action taken by Dean Mercer in his January 25, 1995 letter." Defendants' Exhibit 18 to Motion Hearing held 6/6/95, Affidavit of James A. Bryant.

March 7, 1995 The Academic Review Board recommends to Provost and Vice President for Academic Affairs Dr. Derek J. Hodgson that defendant Mercers' decisions regarding Mr. Marinello's "D" grade and the imposition of disciplinary probation be upheld. Defendants' Exhibit 19 marked for identification to Motion Hearing held 6/6/95, Letter from James A. Bryant to Dr. Hodgson dated March 7, 1995.

March 23, 1995 Dr. Hodgson accepts the recommendations of the Academic Review Board and informs the plaintiff of his decision:

"The Academic Review Board heard your appeal of the grade you received in Food Animal Practice Phase 3 Rotation on March 6, 1995. The Board has unanimously recommended that the grade remain a D. I concur with and accept the Board's decision.

The disciplinary matter that was raised at the hearing should more properly be returned to the Dean of the College of Veterinary Medicine, and I am hereby requesting that you and Dean Mercer discuss the matter further." Plaintiff's Exhibit 3 to Motion Hearing held 6/6/95, Letter from Dr. Hodgson to plaintiff dated March 23, 1995.

April 11, 1995 Defendant Mercer writes the plaintiff a letter requesting that Mr. Marinello comply with the conditions set forth in the January 25 letter and suggesting a meeting to discuss the conditions. Defendants' Exhibit 22 to Motion Hearing held 6/6/95, Letter from defendant Mercer to plaintiff dated April 11, 1995.

May 9, 1995 Defendant Bushby writes a letter to the plaintiff and states:

"As of Monday, May 8, 1995, you have not complied with the requirement to submit a written synopsis indicating your understanding of veterinary medical ethics, nor have you scheduled the appointment with Dr. Mercer to discuss your paper. In view of your failure to meet the explicit requirements for admission to Phase 4 of the professional curriculum as presented to you in writing, I must inform you that your application to Phase 4 of the professional curriculum has been denied. Accordingly, your registration for Phase 4 courses, which commence May 15, 1995 is being canceled." Plaintiff's Exhibit 7 to Motion Hearing held 6/6/95, Letter from defendant Bushby to plaintiff dated May 9, 1995.

May 15, 1995 The plaintiff responds to defendant Bushby's May 9 letter:

"Thank you for your May 9, 1995 letter. Do I understand that the only reason I am

not being admitted to phase four is failure to summarize Principles of Veterinary Medical Ethics?

I did not summarize Principles of Veterinary Medical Ethics since I understood this requirement to include admission of violation of this code of ethics. I decline to admit this since I do not believe I have violated the Principles of Veterinary Medical Ethics.

The only medical ethics requirement applicable is that which says that 'a member should not belittle or injure the professional standing of another member.'

All I have done is express my honest opinion which is my constitutional right. Therefore, I am not going to admit an ethical violation.

My understanding of paragraphs one (1) and five (5) of the Guidelines for Professional Behavior is that veterinarians should not dishonestly criticize other veterinarians but that this does not prohibit honest expressions of opinion. Therefore, I do not believe that this means I can not honestly express my opinion.

The Principles of Veterinary Medical Ethics is written in simple English that a high school graduate could understand. Therefore, any synopsis required of me is harassment.

Please let me know whether you will reconsider your decision to admit me to phase four . . . . Plaintiff's Exhibit 8 to Motion Hearing held 6/6/95, Letter from plaintiff to defendants.

May 16, 1995 — Defendant Bushby responds to the plaintiff's May 15 letter and informs the plaintiff that the decision not to admit the plaintiff to the Phase 4 curriculum will remain unchanged until he complies with the synopsis/analysis requirement of defendant Mercer's January 25 letter.

"Dr. Mercer informed you, by letter dated January 25, 1995, that you were being placed on disciplinary probation and outlined specific requirements for admission to Phase 4 (senior year) of the professional curriculum. These requirements were clear, specific , and related to professionalism. As an educational institution, we have the obligation to guide the full development of our students as they approach the veterinary profession. This full development includes professional, as well as, academic criteria." Plaintiff's Exhibit 9 to Motion Hearing held 6/6/95, Letter from defendant Bushby to plaintiff dated May 16, 1995.

May 18, 1995 — The plaintiff files his complaint with this court.

II. Procedural Background

The plaintiff originally filed this action on May 18, 1995. Filed with the complaint were the plaintiff's motions for a temporary restraining order ("TRO") and for a preliminary injunction to readmit him to the final year of the CVM curriculum pending the resolution of his claims. The undersigned granted the TRO, and set a hearing date for the request for a preliminary injunction. Marinello v. Bushby, et al., Civil Action No. 1:95cv167-D-D (N.D. Miss. May 19, 1995) (Davidson, J.) (Order Granting Motion for Temporary Restraining Order). After conducting a hearing on May 19, 1995, the court denied the plaintiff's motion for a preliminary injunction on the ground that the plaintiff had failed to demonstrate a substantial likelihood of prevailing on the merits of this action.

Marinello, Civil Action No. 1:95cv167-D-D (N.D. Miss. Jun. 7, 1995) (Davidson, J.) (Order Denying Motion for Preliminary Injunction). The plaintiff appealed the June 7 order, and the Fifth Circuit Court of Appeals affirmed this court's decision. Marinello v. Bushby, et al., No. 95-60374 (5th Cir. Jan. 25, 1996) (Order Affirming Denial of Motion for Preliminary Injunction). The defendants have filed a motion to dismiss, or in the alternative for summary judgment. That motion is now pending before this court as are the plaintiff's motion for return of surety bond, the motion of the defendants for judgment against the plaintiff on that security bond, a motion by the plaintiff to submit additional evidentiary materials before the court and the motion of the defendants to strike the materials that the plaintiff seeks to submit.

III. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); Federal Sav. & Loan Ins. v. Krajl, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the party opposing the motion. Matagorda County v. Russel Law, 19 F.3d 215, 217 (5th Cir. 1994).

IV. The Plaintiff's Claims

A. First Amendment Freedom of Speech

This court agrees with the plaintiff's observations that speech protected under the First Amendment is not limited to political speech[2], and may indeed cover a broad range of topics. See, e.g., Connick v. Myers, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (protecting commercial speech); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1024 (5th Cir. 1987) (finding magazine article which discussed practice of autoerotic asphyxia protected). Further, "neither students nor teachers shed their constitutional rights to freedom of speech at the schoolhouse gate." Tinker v. Des Moines Indep. Sch. Dist., 343 U.S. 503, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969); Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 187-88 (5th Cir. 1995) (citing Tinker). It is essential to give the First Amendment its proper application in the educational arena, for "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487, 81 S.Ct. 247, 251, 5 L.Ed. 2d 231 (1960).

Nevertheless, the free speech rights of students are not coextensive with First Amendment rights of the average citizen. State school officials have broad discretion in the management of school affairs and this court will not offhandedly interfere with the "daily operation of school systems." Campbell, 64 F.3d at 187-188 (citing Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968)). Educational authorities such as the defendants in this case have clear and valid interests in carrying out the educational mission of their school, and the pursuit of fulfilling the educational mission of the school can justify restrictions on speech that would not otherwise be valid outside of the educational context. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682, 106 S.Ct. 3159, 3164, 92 L.Ed.2d 549 (1986) (" Nothing in the Constitution prohibits

[2]Political speech, however, does receive more protection that any other form of protected speech. McIntyre v. Ohio Elections Com'n, --- U.S. ---, 131 L.Ed.2d 426, 115 S.Ct. 1511, 1519 (1995) ("No form of speech is entitled to greater constitutional protection than [core political speech]."); Meyer v. Grant, 486 U.S. 414, 421, 100 L.Ed.2d 425, 108 S.Ct. 1886, 1892 (1988) (stating First Amendment protection at its zenith when protecting "core political speech"); FCC v. League of Women Voters of California, 468 U.S. 364, 375-376, 104 S.Ct. 3106, 3114-3115, 82 L.Ed.2d 278 (1984) (noting political speech "is entitled to the most exacting degree of First Amendment protection").

the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the 'work of the schools.'") (citing Tinker, 393 U.S. at 508, 89 S.Ct. at 737). With these principles in mind, the court shall address the plaintiff's claims.

1. The Letter

Initially, the plaintiff charges that he was "expelled" from the CVM for his criticism of professors at the University during the appeal of his "D" grade in the third year class "Food Animal Rotation." The imposition of this sanction on his speech as contained in the letter, the plaintiff continues, is a violation of his right to freedom of speech under the First Amendment. When the Fifth Circuit addressed this court's denial of the plaintiff's motion for preliminary injunction, that court noted of this claim:

> The standard by which the college regulated Marinello's speech mirrors that standard by which he would be measured once admitted to the profession for which his degree was to prepare him. The school's efforts constituted a legitimate educational mission. There was no abuse of discretion as to this claim.

Marinello v. Bushby, et al., No. 95-60374 (5th Cir. Jan. 25, 1996) (Order Affirming Denial of Motion for Preliminary Injunction, p 4-5). This court noted the same when it denied the plaintiff's motion for a preliminary injunction:

> According to the facts as presently known to this court, the regulation of the plaintiff's speech critical of his professors was based upon the ethical standards which govern the veterinary profession. The Vet School at Mississippi State University imposes upon its students the same ethical standards imposed upon the profession . . . . It is highly relevant to this court that the case at bar concerns a post-graduate professional school, and that the prohibition on speech imposed by school officials in this case is no different than that which binds the profession itself. Should Mr. Marinello complete his education and become a practicing veterinarian, he would be required to subject himself to this same standard in order to retain his license to practice.

Marinello v . Bushby, et al., Civil Action No. 1:95cv167-D-D (N.D. Miss. Jun. 6, 1995) (Transcript of Motion Hearing, p. 159-60). The CVM carries as a component of its educational mission the responsibility of preparing potential licensed veterinarians for the ethical obligations that will be legitimately imposed upon them in practice. The imposition of the ethical standards of the veterinary profession upon students at the College of Veterinary Medicine in this case is a narrowly tailored and necessary restriction upon First Amendment rights which serves to advance the

compelling governmental interest of fulfilling the CVM's educational mission. This is not an instance where an undergraduate school imposes upon its diverse student body a code of ethics or conduct which will not necessarily regulate the careers for which they came to learn. Nor is this an instance where the imposition of the ethical standards in question is simply an amorphous attempt to make the students "better citizens." Rather, the students of the CVM are treated as if they were already members of the learned profession which they endeavor to join. Indeed, those students should expect nothing less from an institution charged with the task of preparing them for professional life.

It is this court's ruling, then, that a professional school does not infringe upon the free speech rights of its students when it subjects those students to codes of conduct, ethics or professional responsibility to which they will become properly bound by their profession should they matriculate from the academic curriculum and later become licensed members of that profession. This is, of course, contingent upon the applied professional restriction on speech itself being constitutional as applied to the profession.

For example, suppose a law student solicited clients on his own behalf for pecuniary gain after his graduation and admission to the bar, but in clear violation of the Rules of Professional Conduct governing the legal profession. E.g., Mississippi Rule of Professional Responsibility 7.3 (prohibiting certain in-person solicitation of clients). The rule in question is a constitutional one in this instance, for the United States Supreme Court has determined that a state may categorically ban in-person solicitation by lawyers for profit without infringing upon First Amendment rights. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 472, 108 S.Ct. 1916, 1921, 100 L.Ed.2d 475 (1988) (citing Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978)). Further assume that the law school that the student attends imposes upon all of its students the governing ethical standards of the legal profession. The law school would be justified in doing so and thereby disciplining the student, even though those same standards might be violative of the First Amendment if applied to the everyday citizen. By submitting himself to the study of law, the student

has subjected his First Amendment rights to the same restrictions that bind the profession he hopes to enter.

Likewise, in this case, Mr. Marinello subjected himself to the valid constitutional constraints of the veterinary profession when he sought the education and training to be licensed to that profession[3]. Indeed, he explicitly agreed to be bound by the "highest degree of honesty, integrity, and professional standards" when he applied for admission to the CVM. The imposition of such professional standards by professional schools serves to fulfill the legitimate educational mission of preparing those students to the practice of their anticipated profession. The question then remains - was the restraint imposed upon the plaintiff a valid constitutional restraint upon the veterinary profession?

The relevant ethical provision reads:

> 5. Veterinarians should respect the rights of clients, colleagues, and other health professionals. No member shall belittle or injure the professional standing of another member of the profession or unnecessarily condemn the character of that person's professional acts in such a manner as to be false or misleading.

Principles of Veterinary Medical Ethics, Guidelines for Professional Behavior ¶ 5. The provision is unclear as to its precise meaning. Would one violate the rule by belittling or injuring "the professional standing of another" regardless of the truth of the accusations, or is violation of the rule contingent upon the action taking place in a "manner which is false or misleading?" The placement of the prepositional phrase "in such a manner as to be false or misleading" at the end of the provision makes it grammatically unclear whether that phrase modifies both provisions of the rule or merely the second. It is this court's opinion that the provision would have serious First Amendment flaws if interpreted to mean that one could be punished for making truthful statements which "belittle or

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[3]
Q: You had agreed to abide by professional standards when you came to the school, right?
A: Yes.
Q: Okay. So those standards, you had agreed in advance to abide by those, correct?
A: Yes.
Q: Even though they might somehow inhibit you in some way; this is a professional school, right?
A: Right.

Marinello v . Bushby, et al., Civil Action No. 1:95cv167-D-D (N.D. Miss. Jun. 6, 1995) (Transcript of Motion Hearing, p. 54) (Cross-examination of plaintiff by defendants' counsel).

injure the professional standing of another."

Thankfully, longstanding rules of interpretation provide this court with an appropriate answer. If there exists a reasonable interpretation which does not violate the constitution, this court should apply that interpretation and find the provision valid. United States v. X-Citement Video, Inc., 130 L.Ed.2d 372, 115 S.Ct. 464, 465 (1994); In re Clay, 35 F.3d 190, 196 (5th Cir. 1994); Brown & Root, Inc. v. Louisiana State AFL-CIO, 10 F.3d 316, 326 (5th Cir. 1994). In this case, there is a reasonable interpretation which passes First Amendment muster. Because of the grammatical unclarity of the provision, it can be reasonably interpreted to impose its "false or misleading" requirement upon both prongs of the rule.[4] Read in this manner, the court finds that the provision does not violate the First Amendment, for the provision is entirely constitutional at least insofar as it prohibits the making of false statements or statements made with reckless regard of the truth. Again, as this court has noted in this case previously:

> It is well established law that, subject to some limitations, false statements are not entitled to First Amendment protection. New York Times v. Sullivan, 376 U.S. 254 (1964). Even in its narrowest application, "the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection." Garrison v. Louisiana, 379 U.S. 64, 75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964). What is involved here is a school imposed standard of conduct. Such standards of conduct need not contain the preciseness of a criminal statute. While students do not leave their First Amendment rights at the schoolhouse door, those students do not necessarily enjoy the full extent of freedoms that persons similarly enjoy outside of the school context.

Marinello v. Bushby, et al., Civil Action No. 1:95cv167-D-D (N.D. Miss. Jun. 6, 1995) (Transcript of Motion Hearing, p. 159); see also Arnett v. Kennedy, 416 U.S. 134, 160-161, 94 S.Ct. 1633, 1647-1648, 40 L.Ed.2d 15 (1974) (false statement by employee that employers accepted bribe not protected). This also appears to be the interpretation of the provision used by CVM officials in this case. The primary concern in the administrative proceedings was apparently not that Mr. Marinello merely belittled or injured the professional standing of a member of the veterinary profession, but whether he made false accusations of misconduct against his professors.

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[4]The provision would be more easily understood in this manner if it were drafted slightly differently. For example: No member shall, in such a manner as to be false or misleading : 1) belittle or injure the professional standing of another member of the profession; or 2) unnecessarily condemn the character of that person's professional acts.

Turning to the merits of the plaintiff's claim, the court must consider whether the plaintiff did in fact make false statements to the extent that he was in violation of the Principles of Veterinary Medical Ethics. If he was in violation, then the defendants were well within their authority to sanction him for false speech. However, if Mr. Marinello made no knowingly or recklessly false statements then the defendants cannot constitutionally punish him.

As to the actual truth of the plaintiff's allegations, the parties have offered little evidence. In their submissions, the defendants rely heavily upon the findings of the various committees on the subject. It is true that under federal[5] law, administrative decisions can carry preclusive weight. The United States Supreme Court has determined that the application of collateral estoppel is proper "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate...." United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642, 661 (1966). The Fifth Circuit has applied this test to preclude relitigation. See, e.g., Castillo v. Railroad Retirement Bd., 725 F.2d 1012, 1014 (5th Cir.1984); Painters District Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081, 1084 (5th Cir.1969). Nevertheless, the undersigned is of the opinion that the factual findings of the academic committees in this case do not carry preclusive weight as they are not decisions by an "administrative agency" as contemplated by Utah Construction. Further, there is no evidence that the committee's findings or decisions could be appealed so that they would ultimately be reviewed by a court of law. In this court's opinion, that aspect of administrative review is essential to determining that the parties "have had ample opportunity to litigate." See, e.g., Castillo, 725 F.2d at 1012 (matter came before court on appeal from Railroad Retirement Board); International Union of Operating Engineers v. Sullivan Transfer, 650 F.2d 669, 674 (5th Cir. 1981); Painters, 416 F.2d at 1083 (noting that adminstrative decision not appealed to Fifth Circuit Court of Appeals). The court gives no weight to the submitted conclusions

[5] While not applicable in the present case, Mississippi law also attaches preclusive weight to some administrative decisions. E.g., Raju v. Rhodes, 7 F.3d 1210, 1214 (5th Cir. 1993); M.E.S.C. v. Philadelphia Mun. Sep. Sch. Dist., 437 So. 2d 388, 396 (Miss. 1983).

reached by administrative bodies of Mississippi State University on this issue, for they carry no preclusive weight with this court.

Beyond the findings of the committees, there is little other evidence. Dr. Easley's letter of November 22 contains relevant information, but the plaintiff's affidavits and letters in evidence contradict Easley's assertions. All in all, the court cannot say there is not a genuine issue of material fact on this matter. Upon consideration of the relevant submissions, the court finds that there exist genuine issues of material fact which preclude the grant of summary judgment on this claim. In any event, this court has the discretion, which it exercises here, to allow the plaintiff's claims to proceed to trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("Neither do we suggest . . . that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial."); Rodeway Inns Intern. v. Amar Enterprises, 742 F.Supp. 365, 369 n.5 (S.D. Miss. 1990) ("[A] district court may, in its discretion deny the motion [for summary judgment] in order to give the parties the chance to fully develop the facts at trial."). The motion of the defendant shall be denied as to this claim.

2. The Writing Assignment

As a separate claim arising under his First Amendment right of the freedom of speech, Mr. Marinello challenges as unconstitutional the Dean's requirement that:

> "I require that you provide me with a written synopsis clearly indicating your understanding of these principles [of ethics] and how they apply to your conduct during the grade appeal process. Furthermore, I require that you schedule an appointment to meet and discuss your paper with me. . . .

Plaintiff's Exhibit 6 to Motion Hearing held 6/6/95, Letter from defendant Mercer to plaintiff dated January 25, 1996. It is the plaintiff's position that this requirement imposed upon him the obligation of admitting a violation of these ethical rules. While the requirement on its face does not do so, there is evidence in the record that supports a conclusion that this type of "synopsis" was expected of Mr. Marinello. Dean Mercer testified that he would not allow Mr. Marinello entrance into his final year until he demonstrated a sufficient understanding of the ethical rules of the veterinary medical profession:

A: Unless I have a firm understanding that Mr. Marinello not only understands but is willing to comply with those professional ethics, then I as Dean of the College of Veterinary Medicine cannot honestly agree that he's met the requirements for graduation from that college . . . .

. . .

Q: All right, sir. Do you know of anything that he could do to convince you that he understands the Rules of Professional Ethics?

A: He can write a synopsis, apply that synopsis to his behavior during this period of time, and come and talk with me, maybe on several occasions, depending upon whether or not I believe he understands what the importance of the Code of Professional Ethics is all about..

Q: All right, sir. But wouldn't you agree with me that he really doesn't understand the Rules of Professional Ethics as long as he denies that he had done anything wrong? He doesn't understand the rules, does he?

A: I would agree with you on that. It's certainly far beyond eighth grade English.

Q: All right. So as long as he is saying, I didn't violate the rules of ethics, then it's obvious to you that he doesn't understand the rules of ethics?

A: That's correct.

Marinello v . Bushby, et al., Civil Action No. 1:95cv167-D-D (N.D. Miss. Jun. 6, 1995) (Transcript of Motion Hearing, p. 94-96) (Direct examination of defendant Mercer by plaintiff's counsel).

Such a requirement, the plaintiff contends, violates his "freedom not to speak" under the First Amendment. See, e.g., Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 614, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

First, the court notes that the requested speech with regard to the Principles of Veterinary Ethics is not a "matter of opinion" protected in this sense as described in Barnette. A First Amendment protection against compelled speech has been found only in the context of governmental compulsion to disseminate a particular political or ideological message. United States v. Sindel, 53 F.3d 874, 878 (8th Cir. 1995) (citing decisions). This freedom not to speak is relegated to those areas included in "the sphere of intellect and spirit which it is the purpose of

the First Amendment to our Constitution to reserve from all official control." West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943). If the area of speech is legitimately subjected to official control, then, the "freedom not to speak" can coextensively be regulated. More simply put, the First Amendment "freedom from speaking" is no greater than the "freedom to speak," and they may both be circumscribed by the state in similar manners. Again, the CVM has clear and valid interests in carrying out their educational mission of preparing students for the professional practice of veterinary medicine. By virtue of this fact, CVM officials may circumscribe or even compel some speech in a manner that would not otherwise be permissible outside of that context.

Because of the First Amendment, students and citizens alike are not required by the state to answer to a governmental authority on ultimate questions regarding political, religious or nationalistic questions. Practicing veterinarians are, however, legitimately required to answer to state governmental authority for their conduct governed by the ethical rules of the profession. Miss. Code Ann. § 73-39-19 (n), (s) (stating Mississippi State Board of Veterinary Medicine may revoke licence to practice for "unprofessional or unethical conduct"). Were a veterinarian subjected to ethical charges and faced with losing his license to practice, it would not be sufficient for him to state that his disagreement with the prevailing interpretation of ethical rules *in and of itself* is a protected First Amendment freedom that should preclude punishment for violation of the rules under that prevailing interpretation. Just as the impositions of ethical standards upon the profession justifies the application of those same standards upon students seeking to join that profession, requiring that students engage in particular speech regarding those ethical standards can in some circumstances be justified.

Further, as it is part of the educational mission of the CVM to instruct veterinary students as to the ethical standards governing the profession, the Dean's requirement in this case is more similar to an academic assignment. In such contexts, First Amendment rights yield more readily because of the First Amendment academic freedoms possessed by school officials themselves.

E.g., Settle v. Dickson County Sch. Bd., 53 F.3d 152, 155-56 (6th Cir. 1995) (First Amendment rights not infringed when teacher disallowed student to write paper on the life of Jesus Christ); Peloza v. Capistrano Unified School Dist., 37 F.3d 517 (9th Cir. 1994) (finding science teacher's First Amendment religious freedom rights not violated when school required he teach theories he felt were not scientifically valid, i.e., evolution). Indeed, it is part of the function of schools to compel speech from students to some degree so that officials can ensure that the students are in fact learning what is taught:

> Of course, "state colleges and universities are not enclaves immune from the sweep of the First Amendment,"Healy v. James, 408 U.S. 169, 180, 92 S.Ct. 2338, 2345, 33 L.Ed.2d 266 (1972), but academic freedom is itself a concern of that amendment, and it would not long survive in any meaningful way if courts were to take upon the task of micromanaging the everyday affairs of our nation's colleges. Id. at 180-181, 92 S.Ct. at 2345-2346; Ewing, 474 U.S. at 226, 106 S.Ct. at 513; Bakke, 438 U.S. at 312-313, 98 S.Ct. at 2759-2760; Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589, 602- 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967).

Carroll v. Blinken, 957 F.2d 991, 999 (2nd Cir. 1992). No student can refuse a legitimate academic writing assignment and then claim First Amendment protection from his failing grade.

The single aspect that makes the plaintiff's claim different in this case from the usual exercise of academic freedom by school officials is the fact that the analysis of ethics was not to be applied to a hypothetical situation, which would normally be the case in the educational context. Rather, the analysis was to be made upon the student's own conduct, arguably seeking an admission of wrongdoing. The plaintiff does not allege that the writing assignment violates his Fifth Amendment right against self-incrimination. Nevertheless, it appears that this is the type of constitutional protection that he seeks. See, e.g., Pacific Gas & Elec. V. California P.U.C.,106 S.Ct. 903, 921, 475 U.S. 1, 34, 89 L.Ed.2d 1, 24 (1986) (Rehnquist, J, Dissenting) (noting constitutional liberties most closely analogous to the right to refrain from speaking are Fifth Amendment right to remain silent and constitutional right of privacy). That the plaintiff did not ask for the protection as such is not surprising, for even though a person may assert the privilege against self-incrimination during a civil proceeding, the privilege protects a person from only criminal exposure. U.S. CONST., Amend. V ("[N]or shall [any person] be compelled *in any*

criminal case to be a witness against himself . . . ") (emphasis added); Green v. Bock Laundry Mach. Co., 104 L.Ed.2d 557, 490 U.S. 504, 510, 109 S.Ct. 1981, 1985 (1989); Kastigar v. United States, 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972). What the plaintiff would have this court do in essence is to declare that while the Fifth Amendment right against self-incrimination does not protect a student from a request that he admit a non-criminal wrong, the First Amendment does. This court will not extend such protection in the absence of a separately identifiable violation of First Amendment rights. The fact that the matter in question involved a potential admission of improper but non-criminal conduct does not affect this court's analysis. While the plaintiff may feel that a requirement that he admit non-criminal wrongdoing is "just not right," the undersigned can find no constitutional reason why it should affect this court's examination of his claims.

In sum, this court finds that while Mr. Marinello does possess a First Amendment right "not to speak," the right of school officials to fulfill the educational mission of the CVM justifies the imposed restrictions upon that right in this case. There is no genuine issue of material fact as to this claim, and the defendants are entitled to the entry of a judgment as a matter of law.

B. Procedural Due Process

1. Property Interest

The first inquiry in any due process claim is whether the claimant has suffered a deprivation of a protected interest: life, liberty or property. U.S. CONST. Amend. iv, § 1. In this case, the plaintiff alleges that he possesses a property right under Mississippi law to admission to the fourth year of education at the CVM. This court need not reach the issue, for regardless of whether the plaintiff does in fact possess such an interest, the undersigned finds that there is no genuine issue of material fact as to whether the plaintiff received sufficient notice and opportunity to be heard to protect any such interest.

2. Adequacy of Process Received

If the plaintiff is entitled to procedural due process, he is at a minimum entitled to notice

and an opportunity to be heard on the proposed action. "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing.' " Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)); Chike v. I.N.S., 948 F.2d 961, 962 (5th Cir. 1991). The extent to which the plaintiff is entitled to process is not static and varies upon the particular facts of a given case. Darlak v. Bobear, 814 F.2d 1055, 1062 (5th Cir. 1987) ("[D]ue process is flexible and calls for procedural protections as the particular situation demands.") (citing Matthews v. Eldridge, 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18, 33 (1976)). Identification of the specific dictates of due process requires that the court consider three distinct factors:

1) the private interest that will be offset by the official action;
2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and
3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substituted procedural requirement would entail.

Matthews, 424 U.S. at 334-35, 96 S.Ct. at 902-03, 47 L.Ed.2d at 33. The court has considered each of these factors in making its decisions in the case at bar.

a. Notice

As mentioned *supra*, the plaintiff denies that he was provided adequate notice of the charges against him prior to the Dean's actions:

> "I was never given any notice of any specific charges against me. I was never told, for example, that I was charged with making any specific false statements. Prior to being told that I would not be allowed into the fourth year of study, I was never told what statements I had made which were claimed to be false."

Plaintiff's Affidavit, p.2. This conclusory statement is the only evidence to this effect, however. On the contrary, Mr. Marinello does not dispute that:

1) when he met with defendant Mercer on November 28, 1994, he was provided with a copy of Dr. Easley's November 22 letter which detailed charges against him. The letter contained the accusation of making false statements, and detailed the statements made by the plaintiff that Dr. Easley alleged to be false;

2) he received and had available to him a copy of the CVM Student Handbook, which explained that CVM academic committees had the authority to evaluate students for the "[f]ailure to exhibit desirable professional behavior." The handbook also explained that the punishment for this failure could take many forms, up to and including dismissal from the program;

3) he received a copy of Defendant Mercer's letter of November 30, 1994, wherein Mercer upheld the plaintiff's "D" grade in "Food Animal Practice" and informed him that an appeal of this decision on his grade would be properly made "*to the next highest administrative level, that being the Provost and Vice President of Academic Affairs, Dr. Derek Hodgson*." Defendants' Exhibit 10 to Motion Hearing held 6/6/95, Letter to plaintiff Marinello from defendant Mercer dated November 30, 1994 (emphasis added). No mention of the return of the grade appeal issue to Dean Mercer or another committee of the CVM was contained in the letter;

4) he received Dr. Langston's December 19, 1994 letter which stated that Defendant Mercer had convened a special committee to review "professional conduct relevant to your interaction with faculty," and in part to examine "whether there was a breach in professional conduct expected of students." Defendants' Exhibit 13 to Motion Hearing held 6/6/95, Letter to plaintiff from Dr. Vernon C. Langston dated December 19, 1994.

The undersigned finds that, in light of this and other evidence which is presently before the court, no reasonable juror would find that the plaintiff was not provided sufficient notice in this case. That the plaintiff may have actually remained oblivious to the proceedings transpiring around him is irrelevant, for Mr. Marinello was provided with sufficient notice of the charges against him and the potential consequences should those charges be established as valid. A reasonable person in Mr. Marinello's position should have been aware of both the charges and potential consequences in the case at bar, and the plaintiff's sweeping and conclusory statement in his affidavit that he was not provided sufficient notice is but a mere scintilla in light of the evidence to the contrary.

b. Hearing

In late 1994 or early 1995, the Academic and Professional Standards Committee conducted a hearing for the partial purpose of reviewing Mr. Marinello's "professional conduct as a student." At that hearing, the committee permitted the plaintiff to make a presentation, present evidence and name witnesses for examination by the committee.

Following this hearing and this committee's recommendations, Dean Mercer sent his January 25

letter to the plaintiff which informed the plaintiff of Mercer's finding that Mr. Marinello was in violation of the AMVA rules of ethics and of the disciplinary remedies imposed upon him. However, prior to the CVM's actual denial of admission to the fourth year, the CVM permitted the plaintiff to appeal to the University Academic Review Board which gave him another hearing on the matter in conjunction with his grade appeal. Ewing v. Mytinger & Cassleberry, Inc., 339 U.S. 594, 598, 70 S.Ct. 870, 872, 94 L.Ed.2d 1088 (1950) ("[N]o hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective."). In this second hearing, he was allowed to be present throughout the evidentiary proceedings. Further, he was again permitted to have witnesses called, given the opportunity to submit evidence and gave an oral presentation.

While the defendants might have provided the plaintiff with a more orderly and structured procedure for the notice and hearing involved, Mr. Marinello has nevertheless been provided with adequate notice and opportunity for a hearing to protect whatever property interest he may have had in his fourth year of study. The plaintiff strenuously argues that he was not provided with the opportunity to cross-examine the witnesses against him. Under the circumstances at bar, the undersigned finds that such was not required. See, e.g., Brewer v. Austin Indep. Sch. Dist., 779 F.2d 260, 262 (5th Cir. 1985); Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 701-02 (5th Cir. 1974); Johnson v. Humble Indep. Sch. Dist., 799 F.Supp. 43, 45-48 (S.D. Tex. 1992).

As the Fifth Circuit noted in Boykin:

> There is a seductive quality to the argument-- advanced here to justify the importation of technical rules of evidence into administrative hearings conducted by laymen-- that, since a free public education is a thing of great value, comparable to that of welfare sustenance or the curtailed liberty of a parolee, the safeguards applicable to these should apply to it. At argument appellants' counsel, in response to questions, opined that a right to appointed counsel was probably also existent. In this view we stand but a step away from the application of the *strictissimi juris* due process requirements of criminal trials to high school disciplinary processes.

Boykin, 492 F.2d at 701. As the requirements of procedural due process are not rigid and inflexible, they must yield not only to the nature of the interest at stake, but also to the nature of the tribunal before which the issue is to be presented. The Fifth Circuit has declined to impose

upon school officials the same rigid procedural requirements that protect the rights of those accused of criminal wrongdoing. Brewer, 779 F.2d at 263; Boykin, 492 F.2d at 701 ("We decline to place upon a board of laymen the duty of observing and applying the common-law rules of evidence."). In the opinion of this court, the reasoning applies no differently simply because the plaintiff in this case was a professional veterinary student instead of a secondary student.[6] Mr. Marinello was indeed afforded sufficient opportunity to present his side of the case and to present evidence in support of his version of the facts, and to this he was entitled. School officials allowed him this opportunity after allowing him to be present throughout the entire evidentiary stage of the proceedings before the University Academic Review Board, giving him full opportunity to consider the evidence against him. There is no genuine issue of material fact as to this matter, and the defendants are entitled to the entry of a judgment as a matter of law on this claim.

V. The Eleventh Amendment

Where, as here, the state has not consented to suit, "a suit in which the state or one of its agencies is named as a defendant is normally proscribed by the Eleventh Amendment." Brandley v. Keeshan, 64 F.3d 196, 199 (5th Cir. 1995) (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984)). Federal law claims arising under § 1983 are so precluded. Voisin's Oyster House, Inc. v. Guidry, 799 F.2d 183, 186 (5th Cir. 1986); Jett v. Dallas Indep. Sch. Dist., 798 F.2d 748, 762 n.13 (5th Cir. 1986); Davis v. Department of Health, 744 F.Supp. 756, 758 n.1 (S.D. Miss. 1990). The protection of the Eleventh Amendment also extends to actions against state officials in their official capacity, for

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[6] Indeed, this court believes that a secondary student's right to receive a public education is greater than any right Mr. Marinello may have in completing his professional education. State law mandates that children between the ages of six (6) and seventeen (17) attend public school or a legitimate nonpublic school. Miss. Code Ann. § 37-13-91, et seq. Such a compulsory attendance law creates in those students a property interest in public secondary education. See, e.g., Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1974); Debra P. v. Turlington, 644 F.2d 397 (5th Cir. Unit B 1981); Crump v. Gilmer Independent School Dist., 797 F.Supp. 552, 554 (E.D. Tex. 1992).
Any property interest Mr. Marinello may possess with regard to admission to the fourth year of study does not derive from such a legislative directive.

such is in effect an action against the state. Will v. Michigan Dep't of State Police, 491 U.S. 58, 70-71 n.10, 109 S.Ct. 2303, 2312 n.10, 105 L.Ed.2d 45 (1989); Wallace v. Texas Tech. Univ., 80 F.3d 1042 (5th Cir. 1996). Thus, to the extent that the plaintiff seeks to pursue claims for money damages against defendants in their official capacity[7], those claims are barred by the Eleventh Amendment. The protection, however, ends there. Actions for monetary damages brought under § 1983 against state officials in their individual capacity are not barred by the Eleventh Amendment. E.g., Kentucky v. Graham, 473 U.S. 159, 165-70, 105 S.Ct. 3099, 3104-08, 87 L.Ed.2d 114 (1985); Wilson v. UT Health Ctr., 973 F.2d 1263, 1271 (5th Cir. 1992); Leland v. Mississippi St. Bd. of Registration, 841 F.Supp. 192, 196 (S.D. Miss. 1993); Roos, 837 F.Supp. at 809. Likewise, in the same manner as the claims for monetary damages, the Eleventh Amendment does not prevent a plaintiff from proceeding against an individual defendant in his or her official capacity in order to obtain injunctive or declaratory relief. Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); Wallace v. Texas Tech. Univ., 80 F.3d 1042 (5th Cir. 1996); Leland, 841 F.Supp. at 196. In this instance, it is also well-settled law that qualified immunity under § 1983 offers no protection for claims of injunctive or declaratory relief. Mangaroo v. Nelson, 864 F.2d 1202, 1208 (5th Cir. 1989).

VI. Qualified Immunity

Even though the Eleventh Amendment does not bar individual capacity suits against state officials, those officials are still entitled to the protection of qualified immunity for those claims under the appropriate circumstances. Wallace, 80 F.3d at 1051 n.10; Roos, 837 F. Supp. at 806. Whenever qualified immunity is asserted as an affirmative defense, resolution of the issue should occur at the earliest possible stage. Anderson v. Creighton, 483 U.S. 635, 639, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987); Elliott v. Perez, 751 F.2d 1472, 1478 (5th Cir. 1985). Issues of qualified immunity are determined from the face of the pleadings and without extended resort to pre-trial

[7] During the motion hearing held by this court on May 19, 1995, on the plaintiff's motion for a preliminary injunction, the undersigned granted the plaintiff's ore tenus motion to amend his complaint to include allegations against the defendants in their official capacities.

discovery. Babb v. Dorman, 33 F.3d 472, 477 (5th Cir. 1994). Public officials are entitled to assert the defense of qualified immunity in a § 1983 suit for discretionary acts occurring in the course of their official duties. Harlow v. Fitzgerald, 457 U.S. 800, 806, 102 S. Ct. 2727, 73 L.Ed.2d 396, 403 (1982); Gagne v. City of Galveston, 805 F.2d 558, 559 (5th Cir. 1986); Jacquez v. Procunier, 801 F.2d 789, 791 (5th Cir. 1986).

Public officials are shielded from liability for civil damages as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Davis v. Scherer, 468 U.S. 183, 194, 104 S. Ct. 3012, 3019, 82 L.Ed.2d 139 (1984); Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); White v. Walker, 950 F.2d 972, 975 (5th Cir. 1991); Morales v. Haynes, 890 F.2d 708, 710 (5th Cir. 1989). Stated differently, qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

The first step in the inquiry of the defendants' claim of qualified immunity is whether the plaintiff has alleged the violation of a clearly established right. Siegert v. Gilley, 500 U.S. 266, 111 S. Ct. 1789, 114 L.Ed.2d 277, 287 (1991). This inquiry necessarily leads the court to the second step of the inquiry, which questions whether or not the officer acted reasonably under settled law in the circumstances with which he was confronted. Hunter v. Bryant, 502 U.S. 224, 112 S. Ct. 534, 116 L.Ed.2d 589, 596 (1991); Lampkin v. City of Nacogdoches, 7 F.3d 430 (5th Cir. 1993). "If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity." Blackwell v. Barton, 34 F.3d 298, 303 (5th Cir. 1994) (quoting Pfannstiel v. Marion, 918 F.2d 1178, 1183 (5th Cir. 1990)). Even if the defendants violated the plaintiffs' constitutional rights, they are entitled to immunity if their actions were objectively reasonable. Blackwell, 34 F.2d at 303.

This court does find that the plaintiff's First Amendment freedom to engage in protected speech which is not false or make with reckless regard for its truth was well established long

before the events took place which gave rise to this action. Nevertheless, this court cannot determine the objective reasonableness of the defendants' actions upon the current state of the record. There remain genuine issues of material fact as to the knowledge that these defendants possessed at the time of the alleged constitutional violations. Without knowing the facts of this matter *as they were known to the defendants* at the time, this court is loathe to determine whether or not their actions were objectively reasonable. The defendants are not entitled to the entry of a judgement as a matter of law on this issue.

VII. The Plaintiff's TRO Bond

When this court granted the plaintiff's request for a temporary restraining order, it directed the plaintiff to post a security bond in the amount of $1,000.00. M0arinello v. Bushby, et al., Civil Action No. 1:95cv167-D-D (N.D. Miss. May 19, 1995) (Davidson, J.) (Order Granting Motion for Temporary Restraining Order). Pursuant to Federal Rule of Civil Procedure 65(c), this court imposed such a requirement "for the payment of such costs and damages as may be incurred or suffered by any party which is found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). There are presently motions before the court with regard to the disposition of the plaintiff's posted security. The plaintiff seeks return of the monies, while the defendants seek damages against that amount.

In order to be entitled to an award against the plaintiff's security, the defendants must demonstrate that they have suffered damages "directly attributable to the restraining order or injunction." 7 JEREMEY C. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 165.10.1 (2d. ed. 1996). This standard is most akin to that of causation in a common law negligence action - the defendants must show that but for the issuance of the restraining order or injunction, they would not have incurred such damages. In this case, the defendants primarily seek damages against the plaintiff's security for the expenses incurred by them by virtue of their appearance before this court and the Fifth Circuit in opposition to the plaintiff's motions for injunctive relief. The expenses and damages claimed by the defendants would have been incurred by them regardless

of whether this court had issued a temporary restraining order. The source of the defendants' claimed damages is not an injunctive order of this court, but rather the motions for injunctive relief and appeal by the plaintiff of an order of this court *denying* injunctive relief. Indeed, the vast majority of the expenses claimed were wholly unrelated to this court's issuance of a TRO, but rather to this court's denial of a preliminary injunction. For the defendants to be able to properly show damages "directly attributable" to this court's TRO, the defendants would have to show that they have suffered damages *because of* this court's directive that the defendants:

> are hereby restrained from refusing to admit plaintiff, Anthony Marinello, into the fourth phase of study at the Mississippi State University College of Veterinary Medicine.

Marinello v. Bushby, et al., Civil Action No. 1:95cv167-D-D (N.D. Miss. May 19, 1995) (Davidson, J.) (Order Granting Motion for Temporary Restraining Order). For example, such damages might entail the administrative expense of enrolling Mr. Marinello in classes or other expenditures that would normally be involved in admitting a student into the fourth phase of classes at the CVM. No such damages have been asserted or proven in this case. As all of the claimed damages in the motion at bar would have been incurred regardless of this court's decision upon the plaintiff's motion, the motion of the defendants for an award of damages against the plaintiff's posted security will be denied and the plaintiff's motion for return of that security shall be granted.

VIII. Plaintiff's Submission of Late Affidavits

The plaintiff has also sought to admit affidavits in opposition to the defendants' motions outside of the deadlines established by this court and its local rules. The defendants have moved to strike those affidavits and for this court to not consider them. This court is fully capable of affording the submitted affidavits the weight to which they are entitled, and the undersigned has done so. The motion of the plaintiff to submit additional materials shall be granted, and the defendants' motion to strike shall be denied.

IX. Conclusion

After consideration of the parties' submissions in this matter, the undersigned is of the

opinion that the defendants' motion for summary judgment should be granted in part and denied in part. The defendants are entitled to the entry of a judgment as a matter of law with regard to one of the plaintiff's claims arising under the First Amendment for forced speech and his procedural due claim. Likewise, the plaintiff's claims for money damages against the defendants in their official capacity is barred by the Eleventh Amendment. However, there remain genuine issues of material fact with regard to the plaintiff's remaining claim under the First Amendment for the defendants' alleged retaliation against the plaintiff's protected speech as well as the defendants' assertion of qualified immunity against claims for damage in their individual capacity. Finally, this court finds that the defendants have not demonstrated to the court appropriate damages that can be compensated from the plaintiff's posted security in this matter. The plaintiff's posted security shall be returned to him.

A separate order in accordance with this opinion shall issue this day.

This the _____ day of October 1996.

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ANTHONY MARINELLO — PLAINTIFF

vs. — Civil Action No. 1:95cv167-D-D

PHILLIP BUSHBY, individually
and in his official capacity,
and DWIGHT MERCER, individually
and in his official capacity, — DEFENDANTS

ORDER GRANTING IN PART
AND DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

1) the motion of the defendants for the entry of summary judgment on their behalf is hereby GRANTED IN PART and DENIED IN PART. The motion is granted with regard to the plaintiff's claims for money damages against the defendants in their official capacities, his First Amendment claim that the writing assignment imposed upon him violated his right not to speak, and his procedural due process claim. As to the remainder of the plaintiff's claims, the motion is denied;

2) the plaintiff's motion for return of surety bond is hereby GRANTED. The Clerk of the Court shall return to the plaintiff his posted security in this matter, in the amount of $1,000.00 plus accrued interest;

3) the defendants' motion for judgment on the plaintiff's surety bond is hereby DENIED;

4) the plaintiff's motion to submit additional materials is hereby GRANTED;

5) the defendants' motion to strike is hereby DENIED.

SO ORDERED, this the ___ day of October 1996.

_____
United States District Judge